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Nos. 06-487, 06-503

IN THE

Supreme Court of the United States

JEFFERDS CORPORATION, D/B/A HOMESTEAD MATERIALS HANDLING COMPANY,
Petitioner,

v.

JEREMIAH "BART" MORRIS,
Respondent.

CROWN EQUIPMENT CORPORATION,
Petitioner,

v.

JEREMIAH "BART" MORRIS
Respondent.

On Petitions for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF AMERICAN CHEMISTRY COUNCIL, AMERICAN INSURANCE ASSOCIATION, CERTAINTEED CORPORATION, THE DOW CHEMICAL COMPANY, MOBIL CORPORATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, OWENS-ILLINOIS, INC., AND UNITED STATES STEEL CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*[1]

West Virginia Code § 56-1-1(c) is a reform provision designed to curb the long-exercised and well-documented proclivity of nonresident plaintiffs to swamp that State's courts with mass tort claims having little or no factual connection with the forum. The West Virginia Supreme Court has construed the Privileges and Immunities Clause, U.S. Const., art. IV, § 2, cl. 1, to condemn that statute if it is given its plain meaning. Purportedly to save it, the court construed the statute to require West Virginia courts to hear claims brought by nonresident plaintiffs whenever a West Virginia resident is a defendant — even if none of the operative facts occurred in West Virginia. The result in West Virginia is that nonresident plaintiffs may again besiege its courts with claims arising outside of that State so long as they adopt the expedient of naming a West Virginia resident among the defendants. The ancillary result is to cast a cloud over similar existing or contemplated statutes in other states.

The *Amici* are vitally concerned with the preservation of § 56-1-1(c) and similar laws in other States. The *Amici* are companies and organizations with member companies that have a strong interest in ensuring that mass tort claims are litigated both fairly and in the proper forum. Many of the *Amici* (or their member companies) have been defendants in asbestos mass tort litigation in West Virginia where thousands of out-of-state plaintiffs, lured by that State's pro-plaintiff procedures and atmosphere, brought suit

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

even though their claims had no factual connection with the State.

Amicus the American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $550 billion enterprise and a key element of the Nation's economy. The issue in this case is of direct interest to ACC and its members because asbestos-related actions are often filed in West Virginia courts against ACC member companies even though the plaintiffs in those cases may have little or no contact with the State.

Amicus the American Insurance Association ("AIA") is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files *amicus* briefs in cases before federal and state courts on issues of importance to the insurance industry. The issues in this case are of direct interest to AIA and its members because AIA members are often the liability insurers of companies sued in West Virginia.

Amicus CertainTeed Corporation, headquartered in Valley Forge, Pennsylvania, is a leading manufacturer of a variety of building products, including vinyl and fiber cement siding, vinyl and composite decking, railing and fencing, vinyl windows, residential, commercial and mechanical glass fiber insulation, and residential and commercial roofing, pipe and foundations. CertainTeed has been named as a defendant in several thousand asbestos personal injury lawsuits, including many claims in West Virginia having essentially no connection with that jurisdiction.

Amicus The Dow Chemical Company is a leading science and technology company that provides innovative chemical, plastic, and agricultural products and services to a wide range of markets that are vital to human progress, including food, transportation, health and medicine, personal and home care, and building and construction. Dow and its affiliated companies have been sued in asbestos and other mass tort litigation, including in West Virginia by plaintiffs who have had little or no contact with West Virginia prior to the filing of their lawsuits.

Amicus Mobil Corporation is wholly owned by ExxonMobil Corporation, the largest publicly owned energy company in the world. Mobil has never produced or marketed asbestos. It is a defendant in many asbestos cases, however, because small amounts of encapsulated asbestos were used as a component in heat-resistant coatings products manufactured by the company between 1963 and 1980. Thousands of asbestos claims have been filed against Mobil in West Virginia, most of which do not involve West Virginia residents and arise out of alleged exposures that took place elsewhere.

Amicus the National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Amicus Owens Illinois Inc., a Delaware Corporation with its headquarters in Ohio, is the world's largest manufacturer of glass containers. Between 1948 and

1958, the company manufactured commercial quantities of an asbestos-containing pipe and block insulation in New Jersey. Tens of thousands of asbestos-related personal injury lawsuits have been filed against the company across the country. It appears that many of these cases have been filed in West Virginia by non-resident plaintiffs who have had little or no contact with West Virginia prior to the filing of their lawsuits.

Amicus United States Steel Corporation is an integrated steel producer incorporated in Delaware with corporate headquarters in Pittsburgh, Pennsylvania. Its major steelmaking facilities are located in Indiana, Alabama and Pennsylvania. U S Steel is a defendant in approximately 3,200 active state court asbestos cases. Approximately 90 percent of these cases are filed in "magnet" states that allow or at one time did allow mass filings of asbestos cases with multiple plaintiffs. Over the years, asbestos cases have been filed against U S Steel and new cases are still being filed against U S Steel by non-resident plaintiffs in West Virginia, where U S Steel has no production or office facilities.

STATEMENT OF THE CASE

A. Before the Enactment of § 56-1-1(c), West Virginia Had Been a "Magnet Jurisdiction" For Mass Tort Claims Brought by Nonresident Plaintiffs.

As the Court knows, the "elephantine mass"[2] of asbestos claims filed nationwide is staggering — an estimated 730,000 through 2002.[3] By the mid-1990s, roughly 50,000 new claims were being filed every

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[2] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

[3] Stephen J. Carroll et al., *Asbestos Litigation*, at 70 (Rand Inst. for Civil Justice 2005) (hereinafter "*Asbestos Litigation*").

year.[4] West Virginia has been one of the forums of choice for these claims — a so-called "magnet jurisdiction." Even though that State has less than one percent of the Nation's population,[5] more than 11 percent of the asbestos personal injury and wrongful death claims filed in state courts between 1988 and 1997 were filed there.[6] In fact, between 1993 and 1997, 7.8% of state court asbestos claims filed nationwide were brought in only two West Virginia counties, Monongalia and Kanawha.[7]

The defendants in these cases were gravely hindered in their ability to defend themselves against this avalanche. Plaintiffs' attorneys filed single complaints for hundreds, even thousands, of plaintiffs against dozens of defendants that provided essentially no information about the claims of any individual plaintiff.[8] The West Virginia courts thereupon consolidated thousands of claims for mass trials — a response that led to confusion about the actual cases set for trial and that actually boomeranged and led to increased filings.[9]

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[4] *Id.* at 72.

[5] In 2004, West Virginia's population of 1,815,000 represented about 0.6% of the country's total population of 293,655,000. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, table 21, at 25 (Dec. 2005).

[6] Between 1988 and 1992, 12% of asbestos claims filed in state courts were filed in West Virginia; between 1993 and 1997, the figure was 11%. *Asbestos Litigation*, *supra* note 3, table 3.3, at 62.

[7] *Id.*, table 3.4, at 64.

[8] *See, e.g., Emch v. Owens-Corning Fiberglas Corp.*, Fourth Amended Complaint, No. 95-C-215M (W. Va. Cir. Ct. Marshall Cty., filed Mar. 29, 1996) (complaint named 4,900 plaintiffs and 46 defendants); *Adams v. Owens-Corning Corp.*, Amended Complaint, No. 97-C-22M (W. Va. Cir. Ct. Marshall Cty., filed Mar. 14, 1997) (complaint named 1659 plaintiffs and 49 defendants).

[9] *See State ex rel. Allman v. MacQueen*, 551 S.E.2d 370, 371 & n.1 (W. Va. 2001) (The court estimates that the consolidation plan

The West Virginia courts understood that a majority of these asbestos claims were filed by nonresidents of West Virginia. The concurring justice in *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va.), *cert. denied*, 537 U.S. 944 (2002), an unsuccessful due process challenge to a mass consolidation, observed that "as many as five thousand of the plaintiffs included in the June 24, 2002 mass trial are not West Virginia residents and were never exposed to asbestos in this State. Rather, they have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794-95 (W. Va. 2002) (Maynard, J., concurring). In West Virginia, as elsewhere, the overwhelming mass of asbestos cases "defies customary judicial administration." *Ortiz*, 527 U.S. at 821.

B. Section 56-1-1(c) Was Designed To Curb Abusive Forum-Shopping.

The West Virginia Legislature took action in 2003 by enacting W. Va. Code § 56-1-1(c) which provides that, after its effective date, venue will not lie for any suit brought by "a nonresident of the state * * * unless

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involves "approximately 8,000 asbestos plaintiffs," but adds that it "is uncertain as to the exact number of plaintiffs included in the litigation below."); *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 421 n.3 (W. Va.) (court also "uncertain" as to number of cases, which is estimated to be about 7,715), *cert. denied*, 537 U.S. 944 (2002).

The judge who presided over early consolidations later admitted that they did not eliminate the backlog of cases, but rather simply drew new cases, many of them from out of state: "I will admit that we thought that [an early consolidation] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-22, slip op. (Cir. Ct. Kanawha Cty., W. Va., Nov. 8, 2000) (statement of Judge A. Andrew MacQueen III).

all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state * * *." To provide flexibility, the Legislature provided an exception if the "nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose."

The number of cases filed in West Virginia state courts dropped dramatically after enactment of that provision. In the years 2001 and 2002, an average of 1,850 "mass litigation" civil cases were filed in West Virginia state courts.[10] By 2005 the number had dropped to 57.[11]

C. The Decision Below

West Virginia's effort to control the flood of foreign mass tort litigation is being tested in a less dramatic setting. Respondent Morris is a Virginia resident who sued petitioners in Kanawha County, West Virginia, for an industrial injury occurring in Virginia. The West Virginia Supreme Court of Appeals reversed the trial court's grant of petitioners' motions to dismiss under § 56-1-1(c). Referring to the statute's bar to suit by non-residents, the court held that the "Privileges and Immunities Clause counsels against such discrimination against nonresidents and favoritism and protectionism on behalf of residents." Pet. App. 18.[12] The court then said that a construction of the statute to "categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a

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[10] West Virginia Court System, 2001 Annual Report, table, at 10; West Virginia Court System, 2002 Annual Report, table, at 10. Copies of these reports are available at <http://www.state.wv.us/wvsca/presspge.htm>. The definition of "mass litigation" as used by the West Virginia courts is provided by W. Va. Trial Ct. Rule 26.01(c).

[11] West Virginia Court System, 2005 Annual Report, table, at 16.

[12] All cites to "Pet. App." are to the Jefferds petition in No. 06-487.

nonresident would contravene the constitutionally permissible scope of the [State's] venue statutes" and would also contravene § 56-1-1(a), which provides that "venue lies in suits against domestic corporations doing business in the State." *Id.* at 19 & n.7. The court then noted that it should whenever possible construe a statute so "as to avoid a conflict with the constitution," and concluded: "We therefore hold that *under the Privileges and Immunities Clause* * * * [§] 56-1-1(c) * * * do[es] not apply to civil actions filed against West Virginia citizens and residents." *Id.* at 20 (emphasis added.).

Next the court noted that, under the venue-giving defendant rule, "once venue is proper for one defendant, it is proper for all other defendants subject to process." *Id.* at 22. The court refused to construe § 56-1-1(c) to disturb that rule and thus require a nonresident plaintiff to establish venue independently for each defendant because such a construction, among other things, would "run[] headlong into the foregoing-discussed constitutional principles that strongly disfavor discrimination on the basis of residency in access to the courts." *Id.* at 25.

Justice Maynard dissented and would have upheld the statute against constitutional challenge. *Id.* at 26. Justice Benjamin agreed with much of Justice Maynard's analysis but concurred in the reversal on the ground that Respondent should have been given an opportunity to amend his complaint to allege facts showing that the acts underlying his claim had occurred in substantial part within West Virginia. *Id.* at 31. Justice Albright concurred with the majority's reasoning and conclusions but wrote separately. *Id.* at 39.

ARGUMENT

This case involves the balance between two competing interests that inhere in our federalism: (a) the right of a State to ensure that the expenditures of its resources (here its judicial resources) benefit its own citizens, and (b) the requirement of interstate equality for citizens of other States mandated by the Privileges and Immunities Clause. Review is warranted because the decision below conflicts with two decisions of this Court on how that balance should be struck when the issue is access to courts. Review is also warranted because, if the decision below is allowed to stand, it will predictably affect thousands of cases in West Virginia and possibly thousands more in other states that have adopted or are considering adopting statutes similar to § 56-1-1(c).

I. THIS COURT HAS JURISDICTION.

A. The Decision of the West Virginia Supreme Court of Appeals Is Final for Purposes of 28 U.S.C. § 1257(a).

The Court has jurisdiction to hear this case under 28 U.S.C. § 1257(a), allowing review of "[f]inal judgments" of the "highest court of a State in which a decision could be had." It might be thought that the decision of the West Virginia Supreme Court of Appeals is not "final" because that court remanded the case for trial. But this Court on three occasions has ruled that the decision of the highest state court on whether federal law supersedes state venue requirements is final for purposes of § 1257(a) even though the case has been remanded for trial. *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Burlington N. R.R. v. Ford*, 504 U.S. 648, 650 n.* (1992); *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n. 3 (1976).

As the Court explained in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the decision in such cases rests on two premises. First, the state court's resolution of the impact of federal law on state court venue requirements is a "'separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 483-84 (quoting *Langdeau*, 371 U.S. at 558). Second, it serves the "policy of the federal statute 'to determine now in which state court [petitioners] may be tried rather than to subject them * * * to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.'" *Id.* at 484 (quoting *Langdeau*, 371 U.S. at 558).

Accordingly, under *Langdeau*, *Ford*, and *Starnes* the decision below is final for purpose of § 1257(a).

B. There Is No Independent and Adequate State Ground.

That the West Virginia Supreme Court of Appeals purported to construe the state venue statute at issue so as to harmonize it with that court's interpretation of the Privileges and Immunities Clause does not mean that the decision below rests on an adequate state ground so as to deprive this Court of jurisdiction. The West Virginia court ruled that its construction of § 56-1-1(c) was compelled by its understanding of the Privileges and Immunities Clause, as the court-prepared syllabus of its ruling makes this clear: "Under the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2, the provisions of W. Va. Code, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents."[13] This Court has repeatedly

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[13] Pet. App. 3 (syllabus point 2). Article VIII, § 4 of the West Virginia Constitution requires its Supreme Court of Appeals "to

held that it has power to review a state court's decision when the state court "felt compelled by what it understood to be federal constitutional considerations to construe * * * its own law in the manner it did". *E.g., Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (citation omitted). That is the situation here.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS ALLOWING STATES TO CONDITION COURT ACCESS ON RESIDENCY.

In *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950), this Court ruled that Missouri could dismiss a Federal Employee Liabilities Act case that did not arise in that State on the ground of *forum non conveniens*. The Court held: "[I]f a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control." *Id.* at 4 (quoting *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377, 387 (1929)).

In *Douglas*, the Court upheld a New York statute that gave that State's courts discretion to dismiss claims by nonresidents against foreign corporations, ruling: "There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." 279 U.S. at 387. In yet another case, the Court upheld a state statute of limitations that barred suits by nonresidents if the suit was time-barred in the jurisdiction where the action arose, but allowed suits under the same facts when brought by a

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prepare a syllabus of the points adjudicated in each case in which an opinion is written * * *." *See, e.g., Walker v. Doe*, 558 S.E.2d 290 (W.Va. 2001).

resident. *Canadian N. Ry. v. Eggen*, 252 U.S. 553 (1920).[14]

In sustaining the preferences given residents in those cases, the Court distinguished between state "citizens" and "residents." It construed the statutes at issue to apply equally to all "nonresidents," even if the nonresident happened to be a "citizen" of the forum state, and that equality saved the statutes under the Privileges and Immunities Clause. The same rationale assures the constitutionality of § 56-1-1(c), which may be seen simply to grant preferential access to West Virginia courts to residents of West Virginia over the claims of nonresidents, even if the nonresidents also happen to be citizens of West Virginia.

That, indeed, is the basis on which Justice Maynard dissented below. He would have construed § 56-1-1(c) "to apply to all nonresidents, both citizens and noncitizens of West Virginia" to prevent "a West Virginia citizen who is residing in Ohio * * * and who is injured in Ohio by machinery manufactured by a West Virginia company from suing that company in West Virginia." Pet. App. 29. As Justice Maynard correctly observed: "Such a construction * * * would not offend the Privileges and Immunities Clause" under this Court's decisions in *Mayfield* and *Douglas*. *Id.*

The majority below evidently believed that *Mayfield* and *Douglas* are no longer good law. It said that "[i]t is now established that under the Privileges and Immunities Clause there is ordinarily no difference between discrimination based on a person's 'residence' and discrimination based on a person's 'citizenship,'"

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[14] *See also Chambers v. Baltimore & O. R.R.*, 207 U.S. 142 (1907), where the Court upheld a state statute that allowed only claims for the wrongful death of one of its citizens on the ground that the statute allowed the wrongful death action to be brought by a personal representative who was a nonresident as well as by a personal representative who was a resident.

and it disparaged cases (without ever actually mentioning *Mayfield* or *Douglas*) that make the distinction between the two, given what it said was "the current irrelevance of that distinction in most cases." Pet. App. 7-8 n.2.

This Court in *United Building & Construction Trades Council v. Mayor & Council of City of Camden*, 465 U.S. 208 (1984) did say that "the terms 'citizen' and 'resident' are '*essentially* interchangeable' * * * for purposes of analysis of *most cases* under the Privileges and Immunities Clause." *Id.* at 216 (emphasis added; quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)). But what is "essentially" true for "most cases" is not necessarily or even probably true for cases involving access to state courts. Neither *City of Camden* nor *Austin* overruled *Douglas* or *Mayfield*. On the contrary, both *Douglas* and *Mayfield* were cited with approval by this Court in cases decided after *City of Camden* for the proposition that, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim." *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990)).[15]

Accordingly, *Douglas* and *Mayfield* are still the law of the land and the West Virginia Supreme Court of Appeals erred in failing to follow them. That error standing alone warrants correction by this Court.[16]

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[15] *Douglas* was cited even more recently in *Alden v. Maine*, 527 U.S. 706, 801 (1999) (Souter, Stevens, Ginsberg, & Breyer, JJ., dissenting). *Mayfield* has also been cited repeatedly in relatively recent years. *E.g., American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994).

[16] Indeed, even under the *City of Camden* analysis, § 56-1-1(c) is constitutional. As the Court ruled in that case, "the privileges and immunities clause is not an absolute." Rather, discrimination against nonresidents may be justified "where there is a 'substantial

III. THE DECISION BELOW DEFEATS WEST VIRGINIA'S LEGITIMATE EFFORT TO PROTECT ITSELF AGAINST FORUM-SHOPPING ABUSES AND IMPERILS SIMILAR EXISTING OR ANTICIPATED EFFORTS BY OTHER STATES AS WELL.

The immediate result of the decision below is to permit respondent's case to proceed, even though he resides and his injury occurred in Virginia and even though the trial court found that he had "failed to produce any fact to establish that 'all or a substantial part of *(any) acts or omissions giving rise to (plaintiff's) claim*' occurred within the State of West Virginia." Pet. App. 53 (emphasis and parentheticals in original).

The decision also portends a return by West Virginia to its status as a magnet for foreign mass tort claims — just the problem the Legislature was trying to address. Nonresident plaintiffs, who had previously joined a West Virginia defendant to prevent removal to federal court,[17] will find it easy to join a West Virginia resident as a defendant, with the result that West Virginia courts will again be overrun with asbestos or other mass tort cases and § 56-1-1(c) will become a dead letter.

The decision's effect may be equally pernicious beyond West Virginia's borders. Florida, Georgia, Ohio, and Tennessee, for example, have each limited venue in some or all mass tort cases to claims brought by

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reason' for the difference in treatment" — as where nonresidents are "shown to 'constitute a peculiar source of the evil at which the statute is aimed.'" 465 U.S. at 222 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396, 398 (1948)). In West Virginia the nonresident plaintiffs are virtually the *entire* source of the evil at which § 56-1-1(c) is aimed. Hence the statute should have been upheld under either a general Privileges and Immunities Clause analysis (*City of Camden*) or under the analysis specifically applicable to statutes restricting access to state courts (*Douglas* and *Mayfield*).

[17] *See* 28 U.S.C. § 1441(b).

their residents or to claims brought by nonresidents who were allegedly exposed in those States.[18] Because it is based on federal constitutional grounds, the decision below places a cloud over those statutes and may well deter other States from enacting similar laws to prevent similar abuses.

Moreover, while the holding below, as reflected in the court's syllabus,[19] is that § 56-1-1(c) may not bar a suit by a nonresident against a West Virginia defendant, its reasoning sweeps more broadly, for the court concluded that "there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state's courts under venue statutes when a state resident would be permitted to bring a similar suit." Pet. App. 18. That construction of the Privileges and Immunities Clause would require a State to provide a forum for actions between nonresidents that occurred entirely out-of-state so long as a resident of West Virginia could have brought suit under the same facts.

It would therefore call into question a broad array of state statutes that grant preferential access to the claims of state residents over the claims of nonresidents. These statutes provide venue for claims only in the county where plaintiff lives, or where the defendant has its principal office in the State, or where

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[18] *See* Fla. Stat. § 774.205(1) (limiting venue on asbestos or silica claims to cases where "the plaintiff is domiciled in this state" or where "the exposure to asbestos or silica that is a substantial contributing factor * * * occurred in this state."); Ga. Code Ann. § 51-14-8 (similar limitation to Florida's); Ohio R. Civ. P. 3(B)(11) (limiting venue in asbestos and silica cases to county where all exposed plaintiffs reside or where defendant has its principal place of business); Silica Compensation Fairness Act, 2006 Tenn. Pub. Acts, ch. 728 (2006) (limiting venue on silica claims to actions where "the plaintiff was a resident of Tennessee at the time the claim arose" or where "the claim arose in Tennessee.").

[19] Pet. App. 3 (syllabus point 2).

a substantial part of the events giving rise to the claim occurred. Thus, a non-resident plaintiff may sue a defendant in a state only if the defendant has a principal office there or if a substantial part of the claim arose there, while a resident is not so restricted. Under the principle embraced by the court below, these statutes would appear to contravene the Privileges and Immunities Clause because they provide a forum for claims of residents for certain out-of-state claims but bar such claims by nonresidents.[20]

Other States, such as Texas (a magnet jurisdiction in the 1990s), Colorado, and Louisiana, have enacted statutes requiring or authorizing *forum non conveniens* dismissal of the claims of nonresidents — but not those of residents — if certain conditions are satisfied.[21] These statutes, too, may be in jeopardy if the West Virginia Supreme Court's interpretation of the Privileges and Immunities Clause is correct.[22]

Still other courts have sought to curb abusive forum shopping through the common law of *forum non conveniens*. Thus, earlier this year the Mississippi Supreme Court held that the asbestos claims of nonresidents should have been dismissed for *forum non conveniens*, stating: "The courts of Mississippi will not become the default forum for plaintiffs seeking to

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[20] *See* Ala. Code § 6-3-7; Ark. Code Ann. § 16-55-213; Mo. Rev. Stat. § 508.010 (venue also proper in county were registered agent of foreign corporation resides); S.C. Code Ann. § 15-7-30. *See also* 735 Ill. Comp. Stat. 5/2-201 (venue proper where a defendant resides or where events occurred).

[21] *See* Tex. Civ. Prac. & Rem. Code Ann. § 71.051; Colo. Rev. Stat. § 13-20-1004(1); La. Code Civ. Proc. art 123B.

[22] In conflict with the decision below, the Texas Supreme Court upheld its statute against a Privileges and Immunities Clause challenge, relying on this Court's decision in *Douglas* "because it has never been overruled by the Supreme Court." *Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex.), *cert. denied*, 528 U.S. 1005 (1999).

consolidate mass-tort actions." *3M Co. v. Johnson*, 926 So. 2d 860, ¶ 18 (Miss. 2006). The court held that "less deference should be given to the wholly out-of-state appellees' choice of forum." *Id.* at ¶ 19. *Accord, e.g., Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269, 277 (Ill. 2005) (dismissing claim against Illinois defendant: "[W]hen the plaintiff is foreign to the chosen forum and when the action giving rise to the litigation did not occur in the chosen forum, the plaintiff's choice of forum is accorded less deference.").

The principle that less deference is accorded to the forum choice of a nonresident is deeply established in the law of *forum non conveniens*. This Court has instructed federal trial courts on the subject,[23] and the principle applies even when the nonresident sues a resident defendant.[24] Yet, if the court below is correct that the Privileges and Immunities Clause requires absolute equality between a resident and a nonresident in providing a forum for suits against a State's residents, then the preference in *forum non conveniens* cases for the claims of a State's residents is also constitutionally infirm.

In the end, whether the States try to deal with abusive forum shopping categorically through venue statutes or through consistent case-by-case application of common law *forum non conveniens* principles, they need to be certain that their efforts do not contravene the Privileges and Immunities Clause. There is not a word in that Clause, nor any indication in the decisions of this Court, that the requirements of the Clause apply differently to statutes that draw bright lines than to judicial decisions that proceed on

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[23] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

[24] *E.g., Radeljak v. DaimlerChrysler Corp.*, 719 N.W.2d 40, 43, 48 (Mich. 2006); *Kinney System, Inc. v. Con't. Ins. Co.*, 674 So. 2d 86, 88 (Fla. 1996); *Stangvik v. Shiley Inc.*, 819 P.2d 14, 20 (Cal. 1991);

a case-by-case basis. Either absolute equality between residents and non-residents is required, as the court below erroneously held, or it is not.

Amici believe that West Virginia's § 56-1-1(c) is a sensible response, fully consistent with the Privileges and Immunities Clause, to a crisis in its court system caused by mass filings by out-of-state residents. The statute is reasonable and balanced, providing for venue even for non residents if the cause of action arose within the State or if they cannot get jurisdiction over the defendants in another forum. If allowed to stand, the West Virginia Supreme Court of Appeals' contrary conclusion — that the statute is unconstitutional when applied according to its plain terms — will cast a shadow over similar existing statutes in other states and have a chilling effect on still other states seeking to protect their court systems from inundation by mass filings having no connection to the forum. Mass tort litigation can flow in torrents from one state to another, and it is vital to reaffirm the authority of the states in our Federal system to regulate this flow in a reasonable way — as West Virginia has done here.

Accordingly, this Court should grant review to resolve those uncertainties, if not by reaffirming the supremacy of *Douglas* and *Mayfield*, then by clarifying its Privileges and Immunities Clause jurisprudence so that States may have guidance in their efforts to safeguard the quality of justice in their courts.

CONCLUSION

The Court should grant the petitions for certiorari.

Respectfully submitted,

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